86-859

No. _____

Supreme Court, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE J. KOVAC
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether a federal court is free to disregard state constitutional and statutory law when the government seeks to introduce evidence seized under the authority of a state search warrant issued by a state court judge to a state police officer.

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Lawrence J. Kovac, by and through his undersigned attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, at A-1 to A-30 infra) are reported at 795 F.2d 1509. The order and judgment of the district court (App. B, at A-31 to A-39 infra) are not reported.

JURISDICTION

The judgment of the court of appeals (App. A, at A-1 to A-30 infra) was entered on August 7, 1986. A petition for rehearing was denied on October 9, 1986 (App. C, at A-40 to A-41 infra). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(a).

STATEMENT

A federal law enforcement agent and a local police officer stopped a car,

detained and questioned the driver, and obtained information. A state police officer then applied on the basis of that information to a state court judge for a state warrant to search petitioner's residence. The judge issued the warrant.

The federal government prosecuted petitioner as a result of the execution of the state search warrant. Petitioner moved to suppress the evidence seized under the warrant on the ground that the state police officer's affidavit in support of the warrant was insufficient under state law. The district court denied the motion (App. B, at A-37 infra), concluding that "[f]ederal law determines the sufficiency of the search warrant and affidavit in this case because federal officials acted in concert with state officers in the investigation" (id., at A-33 infra). Petitioner was convicted of violating a federal criminal statute (id., at A-38

infra).

Petitioner appealed, citing Miller v. United States, 357 U.S. 301 (1958), in support of his argument that state law applied. The court of appeals affirmed (App. A, at A-19 infra). The majority concluded, without mentioning Miller, that petitioner's "argument that state law should apply to determine the validity of the warrant and the search is meritless" (id., at A-10 infra). Judge Reinhardt did "not join in that portion of the court's opinion" (id., at A-30 infra), as a result of his "strong disagreement with [the majority's] decision . . . to resolve in a most perfunctory manner an important issue of first impression with significant constitutional implications and equally significant implications regarding the proper balance . . . between state and federal law" (id., at A-20 infra), and his conclusion that "the state's legitimate and

significant interest in the integrity of its judicial process should not be so lightly subordinated" (id., at A-30 infra). However, Judge Reinhardt concurred in the result reached by the majority (id., at A-20 infra) "on either of two alternative grounds" (id., at A-26 infra): (1) "the challenged affidavit is sufficient to support a finding of probable cause under both Oregon and federal law" (id.), or (2) "even if the warrant is invalid under the applicable law, evidence obtained pursuant to it may nevertheless be admitted because the officers acted in good faith reliance on the warrant" (id., at A-29 infra).

Petitioner filed a petition for rehearing, arguing that (1) state law applied, (2) the warrant was invalid under state law, and (3) all evidence seized under the warrant must be suppressed under state law. Petitioner cited a section of the Oregon Constitution, two Oregon

statutes and nine recent Oregon appellate court cases in support of the latter two arguments. The petition for rehearing was denied (App. C., at A-41 infra). Judge Reinhardt voted to grant rehearing (id., at A-40 infra).

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. section 3231.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition because it presents an important question concerning the interaction between the federal courts and state law. Cf. Kossick v. United Fruit Co., 365 U.S. 731, 733 (1961) ("We brought the case here because it presented novel questions as to the interplay of state and maritime law"); Erie R. Co. v. Tompkins, 304 U.S. 64, 71 (1938) ("Because of the importance of the question whether the federal court was free to disregard the alleged rule of

Pennsylvania common law, we granted certiorari").

A state is free as a matter of its own law to impose greater restrictions on police activity than those that this Court holds to be necessary under federal constitutional standards. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975); State v. Caraher, 293 Or. 741, 653 P.2d 942, 947 (1982); Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977). The State of Oregon has exercised that freedom. Compare State v. Davis, 295 Or. 227, 666 P.2d 802, 807 (1983) ("the deterrent effect on future practices against others, though a desired consequence, is not the [state] constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence already

seized. In demanding a trial without such evidence, the defendant invokes rights personal to himself") with United States v. Calandra, 414 U.S. 338, 348 (1974) ("the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"). Therefore, the question presented by petitioner is likely to recur. Certiorari should be granted for that reason as well. See United States v. Zacks, 375 U.S. 59, 60 (1963) ("Because of the recurring importance of the problem . . ., we granted certiorari"); Yellin v. United States, 374 U.S. 109, 111 (1963) ("Since the case presented constitutional questions of continuing importance, we granted certiorari").

Finally, this petition should be granted because the conclusion of the court

of appeals is in conflict with this Court's decision in Miller v. United States, 357 U.S. 301 (1958). See United Mine Workers v. Illinois St. Bar Ass'n, 389 U.S. 217, 219 (1967) ("We granted certiorari . . . to consider whether this holding conflicts with our decisions"); Wilson v. Schnettler, 365 U.S. 381, 383 (1961) ("To consider petitioner's claim that the judgment is repugnant to controlling rules and decisions of this Court, we granted certiorari").

In Miller, a federal law enforcement agent and a District of Columbia police officer arrested the petitioner and seized evidence without a warrant under the authority of District of Columbia law. 357 U.S. at 303-05. The petitioner argued in the ensuing federal prosecution that the arrest, and therefore the search, was unlawful. Id. at 305. This Court concluded that "the validity of

the arrest of petitioner is to be determined by reference to the law of the District of Columbia." Id. at 305-06.

This is a far stronger case than Miller for the application of local law because this case, unlike Miller, concerns federal supervision over the judicial action of a sovereign state. See also Erie, 304 U.S. 78-79 ("the constitution of the United States . . . recognizes and preserves the autonomy and independence of the states, -- independence in their legislative and independence in their judicial departments. [Federal s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial

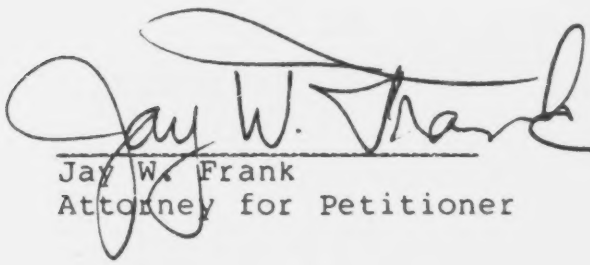
of its independence").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Moule & Frank, Lawyers



Jay W. Frank
Attorney for Petitioner

APPENDIX A

FILED:
August 7, 1986

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-3141
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR 83-60018
vs.	)	
	)	OPINION
LAWRENCE J. KOVAC,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Oregon
James M. Burns, District Judge, Presiding

Argued and submitted May 6, 1986
Portland, Oregon

Before: ALARCON, REINHARDT, and THOMPSON, Circuit Judges.

ALARCON, Circuit Judge:

Defendant/appellant Lawrence J. Kovac (hereinafter Kovac) appeals from the judgment entered following his conviction under 21 U.S.C. section 841(a)(1) for possession of cocaine with intent to distribute. Kovac contends that the trial

court erred in denying his motion to suppress evidence seized from his house pursuant to a search warrant. He raises three arguments on appeal: (1) that information which furnished probable cause for issuance of the search warrant was obtained in violation of his Fourth Amendment rights, thus tainting the warrant and the evidence seized; (2) that the affidavit supporting the warrant was fatally deficient; and (3) that the search warrant was unlawfully executed.

Pursuant to his receipt of information that Kovac was selling large amounts of cocaine from his home, Special Agent Donald Sims (hereinafter Sims) of the Federal Drug Enforcement Agency (DEA) conducted a surveillance of Kovac's residence for over two weeks. In order to obtain information to support the issuance of a search warrant for the residence, Sims and Officer James Miller (hereinafter

Miller) of the Salem Police Department (SPD) stopped Catherine Jo Robins (hereinafter Robins), Kovac's sister-in-law and then a probationary employee of the SPD, as she was driving away from Kovac's residence. The officers did not search Robins' car; instead, they questioned her regarding whether she had observed narcotics trafficking at Kovac's residence. After initially denying that she had observed any criminal activity, Robins admitted that she had seen a plastic bag containing over an ounce of marijuana at the residence that day.

State Police Officer Erik Vognild (hereinafter Vognild) relied on Robins' statement in his affidavit in support of the application for a search warrant for Kovac's residence. The warrant was issued by an Oregon state judge. Kovac's house was searched. The search disclosed, inter alia, 1.6 pounds of cocaine and 1.3 pounds

of marijuana. We discuss the facts pertinent to each of Kovac's contentions under separate headings.

I. The Stop of Robins' Car

Kovac first contends that the stop of Robins' car violated his Fourth Amendment rights, and consequently, the search warrant and evidence seized were tainted. The trial court found that Kovac lacked a legitimate expectation of privacy in Robins' car and, therefore, could not complain of the stop and its consequences. Where the facts are not in dispute, we review the issue of "standing" de novo. United States v. Kuespert, 773 F.2d 1066, 1067 (9th Cir. 1985).

In order to contest the legality of a search or seizure, the defendant must establish that he or she had a "legitimate expectation of privacy" in the place searched or in the property seized. Rakas v. Illinois, 439 U.S. 128, 143-44 (1978).

The defendant must have exhibited an actual, subjective expectation of privacy and, more importantly, the expectation must be one that society is prepared to accept as reasonable and therefore, legitimate. Smith v. Maryland, 442 U.S. 735, 740 (1979); United States v. Pollock, 726 F.2d 1456, 1465 (9th Cir. 1984). The defendant has the burden of establishing that, under the totality of the circumstances, the search or seizure violated his legitimate expectation of privacy in a particular place. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980).

Kovac asserts that he had a legitimate expectation of privacy in Robins' car because: (1) the car was parked in front of his house on three occasions during Sims' surveillance; (2) Kovac had driven the car once during that period; (3) Kovac's wife had a key to the car; and (4) Kovac and his wife had

permission to use the car.

Kovac did not own the car and thus did not have an inherent right to control the car. See Rakas, 439 U.S. at 144 n.12 (although "arcane" concepts of property law do not control, the owner of property will in all likelihood have a legitimate expectation of privacy in property by virtue of his inherent right to control it). Nor was Kovac present at the stop so as to be exercising actual control over the vehicle. Cf. United States v. Perez, 689 F.2d 1336, 1338, (9th Cir. 1982) (defendants had a legitimate expectation of privacy in a truck they did not own because they were closely following and supervising the truck as it made its journey); United States v. Portillo, 633 F.2d 1313, 1317 (9th Cir. 1980) (defendant had a legitimate expectation of privacy in a car he did not own because he was in possession of the car with the permission of the owner and had a

key to it, thus having the requisite level of control over the car), cert. denied, 450 U.S. 1043 (1981).

The sporadic and limited availability of Robins' car to Kovac does not comport with the formal "joint control" arrangements which we have recognized as conferring a legitimate expectation of privacy on a defendant in a place he does not own. Cf. Pollock, 726 F.2d at 1465 (defendant was co-operator of a drug laboratory in his friend's house; he was exercising "joint control" over the property, and thus had a legitimate expectation of privacy in the house); United States v. Johns, 707 F.2d 1093, 1100 (9th Cir. 1983) (because they had a formal arrangement over the vehicle for transportation of contraband, defendants had a legitimate expectation of privacy in marijuana bales seized from a vehicle they did not own), rev'd on other grounds, 105

S. Ct. 881 (1985); Perez, 689 F.2d at 1338 (defendants had a formal arrangement with a driver for transporting contraband in truck which they did not own). In Pollock, Johns, and Perez, the defendants were actively involved in joint control, with the owner, of a place or vehicle which they did not own. By contrast, Kovac's authority to use the car was limited by the availability of the car for his use -- the car was at his house only three times in over two weeks -- and, in fact, he actually used the car only once during that time. Moreover, the defendants in Pollock, Johns, and Perez were asserting a proprietary interest in goods seized from a place or vehicle which they did not own, while Kovac asserts an interest in a person who happened to occupy a vehicle which he did not own. "Unlike a house, a truck, or a package, one cannot acquire a right to exclude others from access to a third

person." United States v. Kuespert, 773 F.2d at 1068; accord, United States v. Brown, 743 F.2d 1505, 1507-08 (11th Cir.), reh'g denied, 749 F.2d 733 (1984) (en banc).

Finally, Kovac cannot assert a legitimate expectation of privacy in the car based on Robins' familial relationship to his wife; the fact that Kovac's wife had a key to the car does not confer a legitimate expectation of privacy on Kovac. See United States v. Hodges, 606 F.2d 520, 523 (9th Cir. 1979) (defendant could not have a legitimate expectation of privacy in the searched premises based on his relationship with a co-conspirator whose father owned the premises), cert. denied, 444 U.S. 1035 (1980).

Because Kovac did not have a significant connection with Robins' car by which he had either an inherent or actual right to control its use and exclude

others, he did not have a legitimate expectation of privacy in the car. Therefore, the trial court correctly held that Kovac's Fourth Amendment rights were not implicated by the stop of Robins' car.

II. Validity of Search Warrant for Kovac's Residence

Kovac next contends that the affidavit filed in support of the search warrant was invalid.

A. Applicable Law

Kovac's argument that state law should apply to determine the validity of the warrant and the search is meritless. In United States v. Henderson, 721 F.2d 662, 664 (9th Cir. 1983), cert. denied, 467 U.S. 1218 (1984), we commented that "[i]t is clear from our precedents that evidence obtained by federal officials, or by federal officials acting in concert with state officers, in violation of state law but in compliance with federal law is

admissible." (emphasis added). See United States v. Adams, 694 F.2d 200, 201-02 (9th Cir. 1982) (evidence obtained by federal and state officials in conformance with federal wiretapping statute is admissible in federal prosecution without regard to state law), cert. denied, 462 U.S. 1118 (1983); United States v. Daniel, 667 F.2d 783, 785 (9th Cir. 1982) (per curiam) (where federal agent was involved in state investigation and decision had been made prior to wiretap to present case to federal court rather than to state court for prosecution, evidence secured by wiretap in conformity with federal constitution and federal law, but in violation of state law, was admissible).

In the instant case, the federal officials were clearly acting in concert with state officers in obtaining the information from Robins and in executing the search warrant. Thus, whether the

officials complied with state law is not relevant; the only question is whether the officials acted in compliance with federal law.

B. Sufficiency of the Affidavit

After Sims and Miller stopped Robins on the open road, Robins agreed to accompany them to the Eugene DEA office, where she was questioned for approximately two hours before she admitted that she had seen narcotics at Kovac's residence. The affidavit for the search warrant was based upon information provided by Robins. It stated, in pertinent part:

> That I [Officer Vognild] had a conversation today with Donald Sims . . . . That he told me that he had a conversation today with Catherine Jo Robins . . . . Sims further told me that Robins told him that she saw more than one ounce of marijuana today at the home of her brother-in-law, Lawrence J. Kovac . . . .

(emphasis added).

Kovac argues that the affiant

Vognild's characterization of Robins' questioning as a "conversation," rather than as an "interrogation," was an intentional and material falsity which rendered the affidavit fatally deficient and the warrant invalid. The trial court found that Kovac did not make a sufficient showing that the statement was intentionally false and, even if inaccurate, the statement was not necessary to a finding of probable cause. The court denied Kovac an evidentiary hearing de novo. United States v. Dicesare, 765 F.2d 890, 895, amended, 777 F.2d 543 (9th Cir. 1985).

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court held that in cases involving evidence seized pursuant to a search warrant, the exclusionary rule continues to apply where the "magistrate or judge issuing the warrant was misled by information in an affidavit that the

affiant knew was false or would have known was false except for his reckless disregard for the truth." Leon, 468 U.S. 897, ___. 104 S. Ct. at 3421 [bound volume of official reporter not yet available] (citing Franks v. Delaware, 438 U.S. 154 (1978)). Under Franks, an affidavit supporting a search warrant will not be questioned unless the defendant can make a substantial preliminary showing that a knowing and intentionally false statement was necessary to the finding of probable cause. Franks, 438 U.S. at 155-56, 171-72. If a defendant makes such a showing, he is entitled to an evidentiary hearing on the warrant's validity. Id.

Kovac made no showing that Vognild intentionally used the word "conversation" so as to deceive the judge, and in the context used, the word would not support such a finding. See Illinois v. Gates, 462 U.S. 213, 238 (1983) (affidavits must be

viewed in practical, common sense manner). More importantly, the characterization of the interview had no bearing on finding probable cause. The affidavit sufficiently established who Robins was, her "basis of knowledge" for the given information, her interest in giving true information, and the information itself which clearly supported finding probable cause. See id. ("task of magistrate is to consider all information, "including 'veracity' and 'basis of knowledge' of persons supplying hearsay information."). Thus, the issuing judge was presented with sufficient information to make a finding that, under the totality of the circumstances, probable cause existed that narcotics would be found in Kovac's residence. Id. (magistrate must determine if there is a "fair probability that contraband" will be found in a particular place).

Therefore, the affidavit was

sufficient to support issuance of a search warrant under federal law.

III. **Execution of The Search Warrant**

Finally, Kovac contends that the search warrant was unlawfully executed because the police failed to comply with the requirement of 18 U.S.C. section 3109 that they be refused admittance by the occupant of the house before entering. The trial court made the following findings of fact regarding the execution of the warrant: (1) Vognild had knocked and announced that they were police officers with a search warrant; (2) Sims saw Kovac, dressed only in his underwear, observing them through the front window; (3) Sims saw Kovac move away from the door after they had knocked; and (4) the police then entered through the unlocked front door. The trial court concluded that exigent circumstances existed which justified the entry.

We review the district court's determinations of historical facts under the clearly erroneous standard. United States v. McConney, 728 F.2d 1195, 1200 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984). The district court's selection of the relevant legal principles is reviewed de novo. Id. at 1200-01.

In United States v. Whitney, 633 F.2d 902, 909 (9th Cir. 1980), cert. denied, 450 U.S. 1004 (1981) (en banc), we recognized an exigent circumstances exception to the section 3901 "knock-notice" requirement. In McConney, we held that when the police have properly knocked and announced themselves, "mild exigency is sufficient to justify simultaneous entry when entry can be accompanied without physical destruction of property." 728 F.2d at 1206. "Mild exigency may exist where there is a likelihood that the occupants will try to

escape, resist, or destroy evidence." Id.

In the instant case, the "mild exigency" test of McConney is clearly met. The fact that the officers observed Kovac moving away from the door after they knocked and gave notice of their identity supports a finding that a mild exigency existed. See United States v. Moreno, 701 F.2d 815, 818 (9th Cir. 1983) (possibility of destruction of evidence exists in every narcotics investigation; there must be specific evidence to support the suspicion that the contraband will be destroyed), vacated on other grounds, 105 S. Ct. 286 (1984); see also United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976) (officers must have observed suspicious activity from within premises, e.g., sound of running feet, for there to be exigent circumstannces). Thus, the execution of the search warrant was lawful under federal law.

The judgment is AFFIRMED.

FILED:
August 7, 1986

United States v. Kovac, No. 85-3141

Reinhardt, Circuit Judge, concurring:

I concur in the result reached by the majority. However, I must register my strong disagreement with its decision first to reach out for and then to resolve in a most perfunctory manner an important issue of first impression with significant constitutional implications and equally significant implications regarding the proper balance to be struck between state and federal law. The majority concludes that where a joint investigation occurs federal law governs the validity of a state search warrant issued to a state law enforcement officer by a state court. It does so by adopting without analysis or discussion a rule previously applied only in an entirely different factual and legal

context. There is no reason whatsoever for us to decide the question the majority resolves. There are at least two other ways to uphold the validity of the warrant at issue here. Both allow us to avoid resolving the sensitive issue of whether state or federal law is applicable.

Whether state or federal law should be used to test the validity of a state warrant obtained by a state officer involved in a joint investigation with federal officers has not previously been decided by this court. The issue is a difficult one involving important interests both from the state and federal standpoint. It should be resolved only after careful inquiry, an inquiry the majority fails entirely to undertake. Moreover, as I have already stated, there is absolutely no reason to decide the question here--first, because the warrant clearly is valid under

both federal and Oregon state law and, second, because the officers relied on the warrant in good faith. The majority offers no excuse for its disregard of the principle that "constitutional issues should be addressed only when strictly necessary." Hospital & Service Employees Union v. N.L.R.B., 743 F.2d 1417, 1427 (9th Cir. 1984) (emphasis added); see also, e.g., Minnick v. California Department of Corrections, 452 U.S. 105, 122-23 (1981); Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947) ("policy of strict necessity in disposing of constitutional issues"). Even if the issue in the case before us does not fall directly within that rule, the principle is equally applicable in view of both the constitutional implications and the sensitivity of the issue.

The majority quotes United States

v. Henderson, 721 F.2d 662 (9th Cir. 1983), to support its pronouncement that the suggestion that state law might apply in the present case is "meritless." In Henderson the search warrant was obtained by an FBI agent, relying in part on information from a county sheriff, and was presumably a federal warrant. It is correct that in dictum we said that evidence obtained by federal officials in violation of state law is not inadmissible even where the federal officials are acting in concert with state officers. However, nothing in that dictum or elsewhere in Henderson provides any support for a holding that federal law applies when determining the validity of a state search warrant obtained from a state court by a state officer. Moreover, we held the search warrant valid in Henderson not because federal law applied, but because the affidavit supporting the warrant

established probable cause even without the disputed material. The other two cases cited by the majority, United States v. Adams, 694 F.2d 200 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983), and United States v. Daniel, 667 F.2d 783 (9th Cir. 1982) (per curiam), are no more supportive of the majority's conclusion. Both involved wiretaps conducted jointly by federal and state officers in conformity with federal wiretap law; neither involved a state search warrant issued by a state court.

In short, none of the cases relied upon by the majority deals remotely with the issue presented by the instant case--the validity of a state warrant procured by a state officer from a state court. Both the state and the federal interests are substantially different in a case where a search is conducted pursuant

to a warrant issued under state law than in a case where a search is conducted under federal law and there is no involvement of a state court at all. The state has a strong interest in preserving the integrity of its own judicial process, an interest that we should at least consider before we decide that the state's law is irrelevant.

It may be that federal law should apply in the present case. However, this important issue should be resolved only after a proper analysis, including an express weighing of the state's interest in the integrity of its warrants. We should not so cavalierly adopt, without discussion, a rule developed in cases not involving state warrants--and certainly, if we do so, we should not dismiss a party's objections as "mertiless" while erroneously claiming that we are merely applying existing law.

As I stated earlier, the warrant may be held valid on either of two alternative grounds, neither of which depends upon our answering the question whether federal or state law applies. First, the challenged affidavit is sufficient to support a finding of probable cause under both Oregon and federal law. Oregon requires that an affidavit supporting a search warrant satisfy the "two-prong" test of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), that formerly was employed in federal courts. See Or. Rev. Stat. 133.545; State v. Horwedel, 674 P.2d 623, 624-25 (Or. App. 1984). Under this test, an affidavit containing hearsay information must set forth both the informant's "basis of knowledge" and facts showing the informant's "veracity" by indicating either that the informant is

credible or that his information is reliable. See, e.g., State v. Carlile, 619 P.2d 1280, 1281 (Or. 1980). Under current federal law, on the other hand, an affidavit supporting a search warrant is to be tested under the more relaxed "totality of the circumstances" test. See Illinois v. Gates, 462 U.S. 213 (1983). Consequently, an affidavit that is sufficient under the more restrictive Oregon standard also satisfies the federal standard. Horwedel, 674 P.2d at 625.

As the majority points out, Kovac has made no showing that the word "conversation" was inaccurate. See, e.g., Illinois v. Gates, 462 U.S. 213, 238 (1983) (affidavits must be read in common sense manner); State v. Villagran, 657 P.2d 1223, 1226 (Or. 1983) (in banc) (same). In addition, inaccuracies in an affidavit do not invalidate a warrant if the rest of the

affidavit supports a finding of probable cause. E.g., State v. Freehely, 556 P.2d 142, 145 (Or. App. 1976). As the majority indicates, the unchallenged information in the affidavit was sufficient to establish the basis of knowledge of the witness on whose statement the state officer relied and the witness's interest in providing accurate information, and to support a finding that probable cause existed that contraband would be found at Kovac's house. See State v. Anspach, 1692 P.2d 602, 605 (Or. 1984 (in banc) (probable cause standard met if facts would "lead a reasonable person to believe that seizable things will probably be found in the location to be searched"). If the majority believes the affidavit is defective under Oregon law, it should explain why it reaches that conclusion. If it does not, there is clearly no reason for us to address the issue of whether to apply

federal or state law.

The second alternative ground that would avoid the necessity of deciding the unresolved choice of law issue is that, even if the warrant is invalid under the applicable law, evidence obtained pursuant to it may nevertheless be admitted because the officers acted in good faith reliance on the warrant. See United States v. Leon, 468 U.S. 897 (1984). Although the district court did not address the issue whether the officers acted in good faith, "if the record is adequate we can reach that question for the first time on appeal since the district court's determination of good faith would be subject to de novo review." United States v. Hendricks, 743 F.2d 653, 656 (9th Cir. 1984), cert. denied, 105 S. Ct. 1362 (1985). Here, the record is adequate. Reliance on a warrant normally establishes the officer's good faith, Leon,

468 U.S. at ___, 104 S. Ct. at 3421; Kovac has made no showing that would suggest a contrary conclusion in the present case.

The majority's failure to analyze the important question it resolves is unfortunate; the state's legitimate and significant interest in the integrity of its judicial process should not be so lightly subordinated. The majority's decision to resolve the previously unanswered question is in any event unjustified; there are two independent grounds upon which our decision could be based, neither of which requires the making of new law. Accordingly, I do not join in that portion of the court's opinion that unnecessarily (and possibly incorrectly) holds that federal law applies in determining the validity of the state search warrant.

FILED:
July 16, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL No. 85-60018
	)	
vs.	)	
	)	ORDER
LAWRENCE J. KOVAC,	)	
	)	
Defendant.	)	

Defendant has been charged with conspiracy to possess and distribute cocaine; possession with intent to distribute cocaine; possession with intent to distribute marijuana; and distribution of cocaine to a minor. Defendant filed several objections to Magistrate Hogan's Findings and Recommendations on defendant's pretrial motions.

Motion to Suppress

Magistrate Hogan denied defendant's

motion to suppress all evidence seized from Robins' car and statements she made on April 9, 1985. The magistrate's findings and recommendations on a motion to suppress evidence in a criminal case are subject to de novo review. 28 U.S.C. section 636(b)(1)(B).

After reviewing the record, I agree with Magistrate Hogan that defendant has no standing to challenge the stop of Robin's car. Defendant did not have a "legitimate expectation of privacy" in Robin's car. See United States v. Salvucci, 448 U.S. 83 (1980). As Magistrate Hogan concluded: "The tie to the car is simply too tenuous." United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), rev'd on other grounds, 105 S.Ct. 881 (1985), does not help defendant's position. In Johns, supra, the defendants had standing because they had an interest in the contraband transported in the car. In this case, there is no allegation that

any of defendant's property was seized from Robin's car.

Defendant also objects to Magistrate Hogan's finding and recommendation denying defendant's motion to suppress evidence found in defendant's residence. After de novo review, I affirm Magistrate Hogan's decision.

Federal law determines the sufficiency of the search warrant and affidavit in this case because federal officials acted in concert with state officers in the investigation of defendant. United States v. Henderson, 721 F.2d 662 (9th Cir. 1983).

The search of defendant's residence was done pursuant to a valid search warrant. Evidence obtained during the search is therefore admissible.

Defendant contends the search warrant was invalid because there were allegedly inaccuracies in the supporting

affidavit. Even if the alleged inaccuracies existed, the search warrant was valid. As the Supreme Court noted in Illinois v. Gates, 103 S.Ct. 2317, 2331 (1983), affidavits in support of a search warrant should not be interpreted in a hypertechnical rather than a commonsense manner. The alleged inaccuracies contained in the supporting affidavit would not have affected a finding of probable cause. Even a "corrected" affidavit would have given a magistrate a substantial basis for concluding that a search would find evidence of marijuana use at defendant's residence.

Defendant is not entitled to an evidentiary hearing under Franks v. Delaware, 438 U.S. 154 (1978), to challenge the truthfulness of the affidavit supporting the search warrant. Defendant has not made a substantial preliminary showing that any false statements were

knowingly, intentionally, or recklessly included in the affidavit. More importantly, none of the inaccuracies allegedly contained in the affidavit affected a finding of probable cause.

Defendant is entitled to, and will be granted an evidentiary hearing on two issues:

(1) whether officers complied with the law when they executed the search warrant on defendant's residence; and

(2) whether defendant's confession was voluntary.

Defendant's allegations raise factual issues which can only be resolved after a hearing. Cohen v. United States, 378 F.2d 751 (9th Cir. 1967).

Motion to Sever Count Four of the Indictment

The first three counts of the indictment charge defendant with:

(1) conspiracy to possess and distribute cocaine;

(2) possession with intent to distribute cocaine; and

(3) possession with intent to distribute marijuana.

Count four of the indictment charges defendant with distribution of cocaine to a minor. Defendant objects to Magistrate Hogan's denial of defendant's motion to sever count four.

Magistrate Hogan's decision may be reconsidered if it is "clearly erroneous or contrary to law." 28 U.S.C. section 636 (b) (1) (A). I find Magistrate Hogan's decision is supported by the evidence in this case.

Fed. R. Crim. P. 8(a) allows the joinder of offenses "of the same or similar character." All four counts of the indictment involve charges of possession and distribution of marijuana or cocaine.

Since the offenses are of the same or similar character, they may be properly joined. Nor has defendant demonstrated that a joint trial in this case would be "manifestly prejudicial." See United States v. Bronco, 597 F.2d 1300, 1302 (9th Cir. 1979).

Conclusion

Defendant's motions to suppress evidence seized from his residence are DENIED. Defendant's motion to sever count four of the indictment is DENIED. Defendant's requests for an evidentiary hearing on whether the search warrant on his residence was properly executed and on whether his confession was voluntary are GRANTED.

IT IS SO ORDERED.

DATED this 16 day of July, 1985.

/s/ Robert C. Belloni
United States District Judge

FILED:
September 19, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL No.
	)	85-60018
vs.	)	
	)	JUDGMENT AND
LAWRENCE J. KOVAC,	)	PROBATION/
	)	COMMITMENT
Defendant.	)	ORDER

In the presence of the attorney for the government the defendant appeared in person on this date -- September 19, 1985 -- with counsel, Jay Frank and David Moule.

There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense of Possession with Intent to Distribute Cocaine, a Schedule II controlled substance, in violation of 21 USC section 841(a)(1), as charged in Count II of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years, pursuant to 18 USC section 4205(b)(2).

ORDERED defendant to pay an assessment of $50 to the United States of America.

The court orders commitment to the custody of the Attorney General and recommends, Lompoc Prison Camp.

/s/ James M. Burns
U.S. District Judge

APPENDIX C

FILED:
October 9, 1986

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-3141
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR 83-60018
vs.	)	
	)	ORDER
LAWRENCE J. KOVAC,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Oregon
James M. Burns, District Judge, Presiding

Argued and submitted May 6, 1986
Portland, Oregon

Before: ALARCON, REINHARDT, and THOMPSON, Circuit Judges.

The panel as constituted above has voted as follows:

Judges Alarcon and Thompson have voted to deny the petition for rehearing.

Judge Reinhardt would grant rehearing.

Judges Alarcon, Reinhardt, and Thompson would reject the suggestion for

rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

PROOF OF SERVICE

I hereby certify that I have made service of the petition for writ of certiorari on respondent by causing to be deposited in a United States post office or mailbox in Eugene, Oregon on the 25th day of November, 1986, three true copies thereof, enclosed in an envelope with first-class postage prepaid, addressed to:

Thomas M. Coffin
Assistant United States Attorney
438 Federal Building
211 E. 7th Avenue
Eugene, OR 97401;

and three true copies thereof, enclosed in an envelope with first-class postage prepaid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530.

I further certify that all parties required to be served have been served.

JAY W. FRANK
Attorney for Petitioner

Supreme Court, U.S.
FILED
DEC 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-859

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE J. KOVAC
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

Supplemental Appendix

Jay William Frank
Moule & Frank, Lawyers
259 E. 5th Avenue
Eugene, OR 97401
(503) 485-1311

FILED:
September 19, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL No. 85-60018
vs.	)	
	)	JUDGMENT AND
LAWRENCE J. KOVAC,	)	PROBATION/ COMMITMENT
	)	ORDER
Defendant.	)	

In the presence of the attorney for the government the defendant appeared in person on this date -- September 19, 1985 -- with counsel, Jay Frank and David Moule.

There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense of Possession with Intent to Distribute Cocaine, a Schedule II controlled substance, in violation of 21 USC section 841(a)(1), as charged in Count II of the Indictment.

The court asked whether defendant had

anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years, pursuant to 18 USC section 4205(b)(2).

ORDERED defendant to pay an assessment of $50 to the United States of America.

The court orders commitment to the custody of the Attorney General and recommends, Lompoc Prison Camp.

/s/ James M. Burns
U.S. District Judge

PROOF OF SERVICE

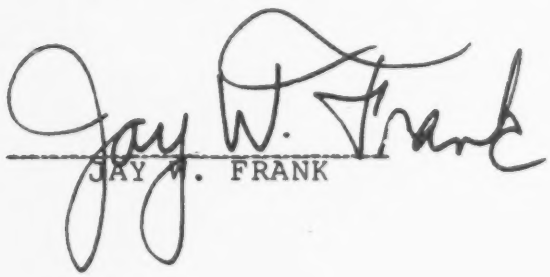
I hereby certify that I have made service of the supplemental appendix on respondent by causing to be deposited in a United States post office or mailbox in Eugene, Oregon on the 26th day of November, 1986, three true copies thereof, enclosed in an envelope with first-class postage prepaid, addressed to:

Thomas M. Coffin
Assistant United States Attorney
438 Federal Building
211 E. 7th Avenue
Eugene, OR 97401;

and three true copies thereof, enclosed in an envelope with first-class postage prepaid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530.

I further certify that all parties required to be served have been served.



JAY W. FRANK

(3)

No. 86-859

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

LAWRENCE J. KOVAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-859

LAWRENCE J. KOVAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that state rather than federal law should determine the validity of a search warrant obtained in connection with a joint federal-state criminal investigation.

1. Following a bench trial in the United States District Court for the District Court of Oregon, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment.

Upon receiving information that petitioner was selling large quantities of cocaine from his home in Salem, Oregon, DEA Agent Donald Sims conducted surveillance of the residence for two weeks. On one occasion during that period, Sims and an officer of the Salem Police Department observed Catherine Robins, petitioner's sister-in-law and a probationary employee of the Salem Police Department, leave petitioner's home in her car. They stopped her and asked whether she had observed narcotics trafficking at petitioner's residence. After first

denying that she had observed any illegal activity, Robins agreed to accompany the agent and the officer to the Eugene, Oregon, office of the DEA, where she admitted that she had seen a plastic bag containing more than one ounce of marijuana in petitioner's home. Pet. App. A2-A3, A12.

An Oregon state police officer subsequently submitted an application to an Oregon state court for a warrant to search petitioner's residence. The application included an affidavit relating Robins' statement. After the warrant was issued, DEA agents and Oregon state police officers searched petitioner's home. In the course of the search, the officers found 1.6 pounds of cocaine and 1.3 pounds of marijuana. Pet. App. A3-A4, A16.

2. On appeal, petitioner argued that Oregon state law, rather than federal law, should have applied to determine the validity of the search warrant. Under Oregon law, he asserted, the warrant was invalid.

Without reaching the question whether the warrant was valid under Oregon law, the court of appeals concluded (Pet. App. A10-A12) that federal rather than state law governed the validity of the search warrant. The court noted that the federal officials "were clearly acting in concert with state officers in obtaining the information" that supported the search warrant for petitioner's home (Pet. App. A11). The officers and federal agents also acted in concert in executing the search warrant (*ibid.*). Accordingly, the court held, "whether the officials complied with state law is not relevant; the only question is whether the officials acted in compliance with federal law" (*id.* at A11-A12). The court then found the warrant to be valid under federal law (*id.* at A12-A16).[1]

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[1] Judge Reinhardt concurred in the result (Pet. App. A20-A30). He took issue with the majority's conclusion that prior Ninth Circuit decisions had settled the question whether federal law governed the validity of the search warrant (*id.* at A22-A25). He argued that the majority

3. Petitioner renews (Pet. 5-10) his claim that state rather than federal law should have applied to determine the validity of the search warrant. He contends (*id.* at 7-9) that the decision of the court of appeals conflicts with this Court's decision in *Miller* v. *United States,* 357 U.S. 301 (1958). The decision of the court of appeals, however, is correct and does not conflict with any decision of this Court or that of any other circuit. Further review is therefore unwarranted.

It has long been established that the lawfulness of a search for purposes of determining the admissibility of evidence in a federal court is a question of federal law. *E.g., Elkins* v. *United States,* 364 U.S. 206, 223-224 (1960); *United States* v. *Zemek,* 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981). Thus, upon concluding that the search warrant for petitioner's home complied with federal law (Pet. App. A15-A16)—a conclusion that petitioner does not contest—the court of appeals did not err in holding that it was irrelevant whether the warrant also satisfied the requirements of Oregon law (*id.* at A11-A12). Other courts of appeals have agreed with that holding, particularly where, as here, the search occurred in the course of a joint federal-state criminal investigation. See, *e.g., United States* v. *Rickus,* 737 F.2d 360, 363-364 (3d Cir. 1984); *United States* v. *Turner,* 558 F.2d 46, 49 (2d Cir. 1977); *United States* v. *Votteller,* 544 F.2d 1355, 1361 (6th Cir. 1976).

Contrary to petitioner's contention, the decision in this case does not conflict with this Court's decision in *Miller* v. *United States, supra.* The Court in *Miller* followed the earlier decision in *United States* v. *Di Re,* 332 U.S. 581 (1948), where the Court held that in the absence of an applicable federal statute, the lawfulness of a warrantless

---

need not have resolved that issue, because the warrant could be upheld on two alternative grounds, one of which was that the warrant was valid under both Oregon and federal law (*id.* at A26-A29).

arrest is determined by the law of the state where the arrest takes place. Regardless of whether that rule is still valid,[2] it has never been extended to determine the lawfulness of searches. The lawfulness of searches, unlike the lawfulness of arrests, has always been a question of federal law when the evidence is offered in federal courts. See *United States* v. *Rickus,* 737 F.2d at 364 n.2 (emphasis in original) (holding that federal law governs validity of search warrant obtained in connection with joint federal-state criminal investigation and observing that "this case does not require us to assess the validity of an *arrest* by state officers. Thus, we need not address the rule set forth in *United States* v. *Di Re* * * *"). Accordingly, there is no conflict between the instant case and either *Miller* or *Di Re.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1987

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[2] The Court has never satisfactorily explained why the lawfulness of a search should be judged by federal standards, while the lawfulness of an arrest (and the admissibility of evidence that depends on the lawfulness of the arrest) should be judged by state standards. Several courts have suggested that *Di Re* may no longer be valid, in light of the Court's decision in *Elkins* and the development of a federal common law governing the lawfulness of arrests. See *United States* v. *Porter,* 701 F.2d 1158, 1165 (6th Cir.), cert. denied, 464 U.S. 1007 (1983); *United States* v. *Miller,* 452 F.2d 731, 733 (10th Cir. 1971), cert. denied, 407 U.S. 926 (1972).

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No. 86-859

In the Supreme Court of the United States

OCTOBER TERM, 1986

LAWRENCE J. KOVAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-859

LAWRENCE J. KOVAC, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

The United States argues (Mem. in Opp. 3-4) that "the decision in this case does not conflict with this Court's decision in *Miller v. United States*," 357 U.S. 301 (1958), on the grounds that (1) *Miller* "may no longer be valid, in light of *Elkins*" *v. United States*, 364 U.S. 206 (1960), and (2) in any event, the rule of *Miller* "has never been extended to determine the lawfulness of searches." A sound analysis of the decisions in *Miller* and *Elkins*, however, shows that (1) *Miller* applies to seizures of evidence under state authority, and (2) the validity of *Miller* was unaffected by *Elkins*.

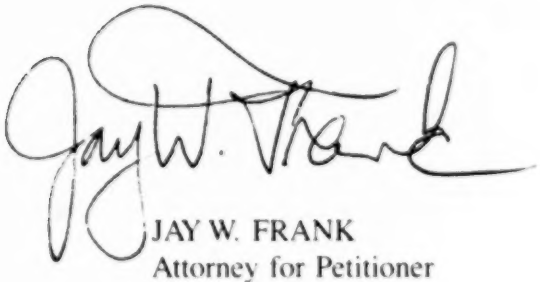
1. The Court in *Miller* held that evidence seized at the time of an arrest authorized solely by state law must be suppressed in a federal criminal trial if the arrest violated state law. That holding requires that evidence seized under the sole authority of a state search warrant issued by a state court judge to a state police officer must be suppressed in a federal criminal trial if the warrant was invalid under state law. The United States recognizes (Mem. in Opp. 4 n.2) that its proposed distinction between seizures under the authority of arrests and seizures under the authority of search warrants is unsatisfactory.

2. The Court in *Elkins* held that evidence seized by state officers must be suppressed in a federal criminal trial if the seizure violated

the Fourth Amendment. The assertion by the United States (Mem. in Opp. 4 n.2) that *Elkins* is inconsistent with *Miller* is without foundation. The two decisions, taken together, state the rule that evidence seized under state authority must be suppressed in a federal criminal trial if the seizure or the exercise of authority violated state or federal law. As this Court stated in *Elkins*, 364 U.S. at 221, "when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it . . . frustrates state policy".

The petition for a writ of certiorari should be granted.

Respectfully submitted,
MOULE & FRANK, Lawyers



JAY W. FRANK
Attorney for Petitioner